

August 2, 2004

Mr. J. Antonio Barbosa
Executive Secretary, ALRB
915 Capitol Mall, Third Floor
Sacramento, CA 95814

Dear Antonio:

On behalf of all segments of California's wine community producing over 90% of the state's fine wines and holding over 25% of our vineyards, the Wine Institute wishes to provide brief comments on the three questions you posed in context of the *Gallo Vineyards, Inc.* case.

- 1) What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election; i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

The ALRB Elections Manual's Section 2-4330 states that the Board must consider "the nature and severity of the violation" when deciding whether to dismiss a petition. This standard is clearly more even-handed than "**any** [emphasis added] level of assistance" as posed by this question. The "**any level**" standard does not employ sufficient grounds to order the extreme remedy of dismissal. A search of NLRA case law substantiates the argument that much more than a de minimis level of assistance is required to dismiss a petition. An ALRB rule that any assistance by an employer results in dismissal of a petition could lead to collusion between employers and unions and thwart employees' rights.

- 2) Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

In that particular case, the NLRB opined "a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order that a decertification petition is tainted, thereby requiring that it be dismissed." The four *Master Slack* factors enumerated in *Overnite* bolster the premise that the mere existence of unfair labor practices and subsequent employee disaffection with an incumbent union is insufficient cause to set aside a decertification. Thus, the Board should examine the extent of the employer's involvement and the corresponding taint to the showing of interest and refrain from dismissal where the employer's conduct did not cause the employees' disaffection with the union.

- 3) Are NLRB cases involving unlawful employer assistance, the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee-initiated decertification petitions?

NLRB cases appear to be relevant. Recent NLRB decisions use the *Master Slack* factors. The General Counsel and/or the charging party have the burden of proof of presenting substantial and specific evidence that the employer's misconduct tainted the decertification petition such that the extreme remedy of dismissal is appropriate.

In conclusion, we encourage the ALRB to employ the "severity" standard in the *Laflin v. Laflin v. ALRB* (1985) rather than now apply an "any level of assistance" standard. Where a decertification petition is at issue, the ALRB should follow the NLRB and its own precedents to determine whether sufficient cause and be guided by the factors set out in *Overnite Transportation Company* and *Master Slack*.

There are so many contexts where an employer's minimal involvement may be present. An inflexible rule would allow manipulation and disenfranchise employees in the exercise of their rights.

Practically speaking, it is highly unreasonable to assume there would be any case where a minimal amount of tainting would not be present. It would be truly injustice to the affected employees to dismiss a decertification petition when there is a lack of substantial evidence that an overwhelming majority of voting workers were coerced by employer assistance.

Respectfully,

Mike Falasco
Legislative Representative